

No. 24-1120 (and consolidated cases)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF WEST VIRGINIA, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

**On Petitions for Review of Final Agency Action of the
United States Environmental Protection Agency
89 Fed. Reg. 39,798 (May 9, 2024)**

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GLOSSARY OF TERMS

Bcfd Billion cubic feet per day

EPA U.S. Environmental Protection Agency

ICF ICF International

The pipeline construction needed to achieve 40% co-firing cannot be accomplished by 2030, as the Rule requires.

Petitioners explained why the Rule's three-year estimate for permitting and construction of necessary pipelines is unrealistic and flawed. In its Supplemental Brief, EPA never convincingly responds.

Based on a review by ICF International ("ICF"), EPA projects that the permitting and construction of the pipelines necessary for 40% co-firing will "take no more than 3 years for most sources (June 2026 to June 2029)." Supp. Br. 1 (citing JA 0096 (89 Fed. Reg. 39,798, 39,893 (May 9, 2024))). ICF did say that the average permitting and construction time for *lateral* pipelines "is about three years." But ICF also cautioned that "some projects could take ... *up to five years* for approval and construction if they experience difficulties." JA6273 (GHG Mitigation Measures-Steam TSD, Att. 18 at 42) (emphasis added)). EPA ignored that longer timeline. *See* Pet. Br. 122-23.

Even ICF's five-year timeline is optimistic. As this Court knows, pipelines routinely *do* experience difficulties in obtaining the required permits. *See, e.g., City of Port Isabel v. FERC*, 111 F.4th 1198, 1204-06 (D.C. Cir. 2024) (Garcia, J.) (permit application filed in 2016 for still-unconstructed pipeline connecting new fuel terminal to existing pipeline

and summarizing lengthy history of challenges); JA2716-17 (NRECA-EERC Comments 11-12); JA2046 (PGen Comments 35 & n.128). So, it is quite possible—indeed, likely—that permitting and construction for a necessary pipeline would take five years, as ICF cautioned (or even longer). And ICF’s optimistic five-year timeline would extend EPA’s anticipated pipeline completion date from June 2029 to June 2031—a year and a half after compliance begins.

Under these circumstances, the possibility of “a compliance date extension” would not save the day. *Contra* Supp. Br. 2. Even if a coal plant could get one—no guarantee—an extension cannot exceed one year (i.e., until January 1, 2031). JA0217 (89 Fed. Reg. at 40,014 (“States *may* incorporate into their state plans a mechanism that allows compliance date extensions up to 1 year ... *under specific circumstances*” (emphases added)). If permitting and construction take up to five years, as ICF warned, the one-year extension will not enable the pipeline to be completed before compliance is required.

EPA’s timetable is also flawed because EPA assumed that only *lateral* pipelines would be needed for 40% co-firing. JA0096 (89 Fed. Reg. at 39,893 & n.682 (mentioning laterals 13 times, including

“construction of a lateral pipeline,” estimated costs for “new lateral pipeline capacity,” and assessment of “each assumed new lateral”)).

Because laterals connect to an already-existing nearby pipeline, they tend to be shorter than non-lateral pipelines (taking less construction time) and not as controversial (taking less permitting time). *See* Pet. Br. 124. Yet nothing shows all the necessary pipeline projects can be laterals.

EPA notes ICF reviewed “both lateral and non-lateral pipelines.” Supp. Br. 2. But while ICF might have reviewed some “non-lateral projects that solely serve power plants,” JA6272 (GHG Mitigation Measures-Steam TSD, Att. 18 at 41), ICF’s “assessment estimates the length of time required to develop, permit, and construct natural gas pipeline *laterals* to coal plants,” *id.* (emphasis added)); *see also* JA6273 (*Id.* at 42) (concluding “the average time ... to design, permit, and construct *laterals* to coal plants is about three years”) (emphasis added)). In failing to correctly assess the amount of time necessary for all facilities to obtain natural gas—including those needing a non-lateral pipeline—EPA arbitrarily and capriciously failed “to consider an

important aspect of the problem.” *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

EPA concludes, again relying on ICF, that the gas industry can place into service “sufficient gas pipelines for sources to comply with the Rule” by 2030. Supp. Br. 2. ICF “assess[ed] aggregate annual levels of pipeline development from 2015 through 2021.” JA6268 (GHG Mitigation Measures-Steam TSD, Att. 18 at 37). Its analysis showed “that, on average per year, there were 36 individual pipeline projects (i.e., 254 total projects over the seven-year period) completed with a mileage of 1,200 miles and an aggregate capacity of about 14 [billion cubic feet per day (Bcfd)].” *Id.* The Rule’s expected pipeline buildout greatly exceeds this average both in project numbers (93 vs. 36) and miles of pipeline (1,778 vs. 1,200). *Id.* Only expected pipeline capacity (7.35 Bcfd) is within the 7-year average ICF calculated. *Id.*

Indeed, none of the years examined came anywhere close to completing the 93 annual projects the Rule contemplates. The maximum occurred in 2018, when 55 projects were completed. JA6269 (*Id.* at 38, Figure 7). Similarly, pipeline miles exceeded the 1,778 annual miles the Rule would require in only one year (2017). *Id.*

In short, the record does not support EPA's imagined three-year timeline for constructing a vast, nationwide natural-gas pipeline network.

Dated: December 4, 2024

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CERTIFICATE OF COMPLIANCE

This Supplemental Brief complies with the type-volume limit of the Court's order of November 25, 2024, ECF No. 2086679, because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), this brief contains 800 words, which is within the 800-word allotment provided by the Court to Petitioners for this Supplemental Brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: December 4, 2024

/s/ Michael R. Williams

Michael R. Williams